SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 361

EQUITABLE LIFE INSURANCE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Equitable Life Insurance Company, prays that a writ of certiorari issue to review the final Judgment of the Court of Appeals for the Sixth Circuit enforcing a decision and order of the National Labor Relations Board based upon proceedings had in violation of the provisions of the National Labor Relations Act, as amended, herein referred to as the Act, and of Petitioner's constitutional right of due process of the law.

OPINIONS BELOW

The Circuit Court for the Sixth Circuit entered an order on May 10, 1968 granting enforcement of the Order of the National Labor Relations Board, herein called the Board, upon its petition for enforcement. No printed opinion was filed. A copy of the Court's decree is appended.

The pertinent opinions (decisions) of the Board are as follows:

Decision and Direction of Election, dated September 11, 1962, reported in 138 NLRB 529. (J.A. 9a-15a)[1]

Decision and Order, dated March 25, 1963 reported in 141 NLRB 718.

Supplemental Decision and Order, dated March 1, 1967, reported in 163 NLRB No. 28.

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 10, 1968. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board, having articulated reasons (Supplemental Decision in *Metropolitan Life Insurance Company*, 156 NLRB 1408) for its unit determinations in the insurance industry *on remand* from this Court (*N.L.R.B.* v. *Metropolitan Life Insurance Company*, 380 U.S. 438) has reasonably exercised its statutory discretion in applying such criteria in establishing a unit of debit agents confined to three of thirteen offices in the State of Ohio where the facts of the case, including a history of collective bargaining on a state-wide basis, are

[1] References to the record printed as a Joint Appendix are designated "J.A."

inapplicable to such criteria and do not support the findings.

2. Whether the Board's exclusion of evidence pertaining to the extent of organization by the Union of the Company's employees constituted a denial of due process where the asserted reason for such exclusion is that the Board did not give controlling weight to such extent in reaching its decision and therefore the exclusion was not prejudicial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States, Amendment XIV, Section 1: * * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

2. Section 9(b) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 159 (b) (in its pertinent part):

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

3. Section 9(c) (5) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 159 (c) (5).

> In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

STATEMENT OF THE CASE

This petition seeks review of a judgment of the Court of Appeals for the Sixth Circuit which enforced an order

of the Board directing Petitioner, a life insurance company, herein called the Company, to bargain with Insurance Workers International Union, AFL-CIO, herein called the Union, in a unit composed of debit insurance agents employed in its two separate district offices located in Cleveland, Ohio and a sub-office in Lorain, Ohio.

The Company deliberately refused to bargain with the Union in order to challenge the appropriateness of the certified unit. No unfair practice is involved other than the refusal to bargain.

The Board entered an Order reported in 141 NLRB 718 (1963) finding that Petitioner had violated the statute. Following this Court's opinion in *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438 (1965) the Board's order was remanded by the Court of Appeals for the Sixth Circuit on May 20, 1965 for further proceedings. Thereafter the Board issued a Supplemental Decision in this matter (163 NLRB No. 28), reaffirming its Order of March 23, 1963, and filed its petition, *upon remand*, for enforcement. The Sixth Circuit issued the Order granting enforcement to which this petition is directed.

The Company conducts its operations from its Home Office in Washington, D. C. and through numerous field offices located in seven states and the District of Columbia. The alleged violation occurred in the State of Ohio wherein it maintains offices in thirteen cities (J.A. 26a). Each such office is under the local supervision of a district manager who has no authority whatever in deciding questions affecting the employees in the context of collective bargaining. (J.A. 45a, 47a, 48a, 49a, 50a, 51a).[2] The

[2] The uncontradicted evidence is that the single district office in this Company is *not* a self-contained unit and does not operate autonomously. The record actually shows that there is no local or district authority over (1) hiring, (2) firing, (3) suspension, (4) disciplinary action, (5) duties, (6) rates of pay, (7) hours, (8) retirement benefits, (9) group life insurance benefits, (10) medical

Board itself found (Decision, J.A. 12a) that all labor relations policies are established at the Home Office, where authority for deciding all matters relating to hours, wages and working conditions is centralized.

The business of the company is regulated by each state in which it operates. The agents are also under state regulation. The Company and the agents must be licensed by the state. Their operations are subject to state supervision. Consequently, Company operations are on a state-wide basis.

The majority[3] found (J.A. 12a) that there is virtually no exchange or transfer of agents among these offices, and that there is no business or social contact among the agents in these offices, except on the individual office level.

The history of collective bargaining relating to the debit agents herein involved (J.A. 58a, 62a, 74a, 75a), as well as those of fellow agents of this Company in other states than Ohio, has been on a state-wide basis—that is every office in the particular state has been grouped in one unit. At time of hearing this Company had *current* contracts with the Union covering debit agents on a state-wide basis in the District of Columbia, continuously for 22 years to date of hearing (J.A. 62a), and in the State of Delaware continuously from 1952 to date of hearing (J.A. 65a, 66a).

Thus this record shows a present current history of bargaining with this Union affecting agents in other areas on a broader (state-wide) unit basis.

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and disability benefits, (11) transfers, (12) promotions, (13) leaves of absence, (14) holidays, (15) changes in territory, (16) agents' training schedules or program content, (17) purchase of supplies and equipment (18) incurring new expenses, (19) advertising, or (20) origination of sales material. Every iota of evidence points to the complete absence of any autonomy at this local level.

[3] *Equitable Life Insurance Company*, 138 NLRB 529 3 to 2 opinion.

The Board in a 3 to 2 opinion approved the Union's unit request in the underlying representation case, 138 NLRB 529, *supra*, finding the individual district office to be inherently appropriate for bargaining and the grouping of the offices into one unit to be justified by cogent geographic considerations, in the absence of recent collective bargaining history (J.A. 12a).

The *dissent* of the minority of two members concluded that the unit was inappropriate stating:

> "The Union here seeks—and the majority is finding appropriate—a unit of debit agents employed by the Employer in its two separate district offices in Cleveland, Ohio, and the detached office in Lorain, Ohio. We would dismiss the petition, not only because the unit is less than Statewide in scope and therefore inappropriate (see the dissenting opinion in Quaker City Life Insurance Company, 134 NLRB No. 114), but also because the location of these offices, the factor relied upon by the majority, is not a cogent reason for grouping these debit agents into one unit. As the majority points out, the district offices operate independently of one another, the debit agents employed in these different offices have separate, immediate supervision, there is virtually no interchange or transfer between the offices, and there is no business or social contract between the debit agents in the district offices. Thus, there is lacking here evidence that these debit agents employed in these different offices share a community of interest, with respect to the unit sought, warranting establishment of such a unit. It appears to us that this unit is one based upon extent of organization.
>
> For the foregoing reasons we would dismiss the petition. See our dissenting opinion in *Metropolitan Life Insurance Company*, 138 NLRB No. 64."

As indicated the Company refused to bargain in order to challenge this unit determination. A majority of the Board issued the decision embodied in *Equitable Life In-*

surance Co., 141 NLRB 718 (supra) which was reaffirmed *on remand* on the rationale of its Supplemental Decision in *Metropolitan Life Insurance Company, supra.*

REASONS FOR GRANTING THE WRIT

1. The decision of the Board is in conflict with and violates the very guiding principles enunciated by it in its Supplemental Decision in *Metropolitan Life Insurance Company, supra*, and is not supported by the substantial evidence.

On remand in that case, as in this, the Board stated that it looks to "such factors as the community of interest among the employees to be represented; whether they comprise a homogenous, identifiable, and distinct group; whether they are interchanged with other employees; the extent of common supervision; the previous history of bargaining; and the geographic proximity of various parts of the employee's operation." And, at 1417 in further explication of geographic considerations and bargaining history the Board held that "a city, a metropolitan area, a state, cover well-defined geographical areas. Each of these areas represents a possible appropriate area grouping for bargaining purposes. No one of these areas, in *the absence of bargaining history . . . is exclusively appropriate.*"

The undisputed factual record, including the findings of the majority of the Board, negative each of these factors in the case at bar. Let us examine each criterion cited by the Board, and the manner in which it was applied, or not applied, to the facts in this case.

a) *The factors of community of interest among the employees, and interchange.* The employees involved are in three separate offices. Two are in Cleveland, Ohio, 10 miles apart, and the other is in Lorain, Ohio, 28 miles from Cleveland (J.A. 11a, 56a). The Board found that there is no interchange or transfer of agents among the

offices, and there is no business or social contact among the agents in these three offices. (J.A. 12a). Thus it is clear that the record belies any community of interest among such employees. They are not a homogenous, identifiable and distinct group because of any specific valid characteristic which logically should group them for bargaining purposes. As the *Dissenting Opinion* of the Board shows: "Thus there is lacking here evidence that there debit agents employed in different offices share a community of interest . . ." (J.A. 14a)

b) *The factor of extent of common supervision.* The Board's own finding of fact is to the contrary. It has found each office to be a separate administrative entity" with its own separate supervision. The absence of common local supervision over the three separate offices as a group should tend to preclude the finding of the group as appropriate.

c) *The factor of geographic proximity.* In its representation Decision, which underlies this entire case, the Board majority held, without clarification, that the individual separate offices may be grouped together because of "cogent geographic considerations" (J.A. 12a). This factor, *on remand*, is termed "geographic proximity", meaning "an area clearly defined and sufficiently compact so that a single bargaining unit will permit the employees to exercise their collective bargaining rights under the Act". In the instant case, it is used to support the grouping of two separate offices in Cleveland, 10 miles apart, with an office in Lorain, 28 miles distant (J.A. 11a, 56a), in one single unit. In another case *Western and Southern Life Insurance Company*, 138 NLRB 538 (1962), where the same factors existed, the Union received approval for *separate* units of two district offices—only 7 miles apart —and located 12 to 14 miles from three other district offices all five of which are in the Pittsburgh metropolitan area. The reason for such approval, as in the instant

case, was fundamentally because the Union sought such units the Board concluding (at p. 540). "Therefore, *as the Petitioner in the case is requesting single district units* at the Employer's offices . . . we find that separate units . . . at these two offices constitute units appropriate for collective bargaining" (emphasis supplied).

Over-riding all the rhetoric of the Board's rationale is the inevitable end result *in every case* that the unit approved is the one that *coincides precisely* with the extent to which the union has successfully organized. In this case there is nothing reasonably compact in the grouping of these offices so widely separated that their very separation has deterred any social or economic contact leading the *dissenters* to conclude that the unit was based on extent, and therefore invalid, since the "location of these offices, the factor relied on by the majority, is not a cogent reason for grouping these debit agents into one unit" (J.A. 14a).

d) *The factor of bargaining history.* In further explication, *on remand*, of its reasoning for grouping various separate offices in a geographic area or areas the Board announced the principle that "*no one of these areas, in the absence of bargaining history is exclusively appropriate*". (emphasis supplied) *Metropolitan*, 156 NLRB at 1412. Conversely an area, whether a city or State, is exclusively appropriate where bargaining history in fact supports it. The facts recited, *supra*, show that this company and this union had agreements currently in existence at date of hearing on a state-wide unit basis covering this very class of employees (debit agents) in two states. Furthermore the employees in these three offices here involved had been in a state-wide unit under collective bargaining contracts between the Company and the Union. Finally, these same employees had voted in a Board election, lost by the Union, in a state-wide unit,

barely 13 months[4] prior to the Union's petition confined to these three offices. This history alone militates against the approval of a unit less than state-wide in scope, even assuming, *arguendo*, that the individual district office may be appropriate under other facts.

In view of the inapplicability of the criteria to the facts of this case, the inescapable conclusion is that this unit is based upon extent of organization contrary to the mandate of Sections 9(c) (5) of the Act. Certain it is that this record does not support the findings of the Board. There is lacking that substantial evidence which "is the dividing line between law and arbitrary power". *NLRB* v. *Thompson Products, supra.*

2. The Board's exclusion of evidence pertaining to the extent of organization by the Union of the Company's employees constitutes a denial of due process where the reason for such exclusion is the Board's assertion that it did not give controlling weight to such extent in reaching its decision and therefore it need not hear evidence thereon.

The Company attempted to introduce evidence relating to the extent of the Union's organizational activities in Ohio. The objective was to make a full record so that the Board could be fully informed in the discharge of its statutory discretion in unit determinations, particularly in the light of Section 9(c) (5), *supra*, which prohibits extent as the controlling factor in unit decisions. The Board's reason for excluding such evidence was that it did not give controlling weight to extent in arriving at its decision (J.A. 9a) so that it was not error to exclude it. The extraordinary premise of this conclusion is that evidence may be dispensed with because it would not have affected the outcome, or that the Board has been in some manner able to evaluate rejected testimony without even

[4] Election on state-wide unit in Ohio, including the three offices here involved, held December 20, 1960. Union filed underlying petition herein on January 11, 1962.

hearing it. This is not due process. This Court has repeatedly held that where the Congress has granted so broad a power within the realm of administrative discretion, "all the more insistent is the need, when power has been bestowed freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity". *Ohio Bell Tel. Co.* v. *Public Utilities Comm.* 301 U.S. 292, 304. And the Eighth Circuit declared in *N.L.R.B.* v. *Burns, et al*, 207 F. 2d 434, 436 (1953), quoting from *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F. 2d 215, 224 (C.A. 8):

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it amounts to a denial of due process is not open to debate . . . . *That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point.* The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v. Thompson Products, Inc., 6th Cir., 97 F 2d 13, 15; Foore Bros., Gear & Mach. Corp. v. National Labor Relations Board, 7th Cir., 114 F 2d 611, 621." (emphasis supplied).

The Court below fell into the same error holding that there was no prejudice in the exclusion since "the extent of organization cannot be given controlling weight . . ." and, consequently, evidence thereon is apparently immaterial. However the point is *not* that extent cannot be given controlling weight in unit determination but rather *that a litigant has the right to invoke the exercise of the Board's discretion upon a full and fair consideration of all the relevant evidence.* Such evidence is relevant to the Board's inquiry and upon due consideration *may* be persuasive weight in the exercise of its discretion.

The right to such a fair hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. *Ohio Bell Tel. Co., supra*, at 305. This case represents a classical denial of due process and is particularly repugnant to the concept of a fair hearing since the evidence was directly related to the exercise of the Board's discretion. The Board may not avoid its constitutional obligations to litigants in this arbitrary fashion.

CONCLUSION

It is respectfully submitted that the Court review this matter because of the Board's failure to conform its unit determination to the very principles which it itself enunciated *on remand* from this Court, and because it denied due process to Petitioner.

It is respectfully submitted that the petition for certiorari be granted.

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